No. 98-788

Supreme Court, U.S.
FILED
1998

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

CYNTHIA E. CANADY, *et al.*,
Petitioners,
v.
ALLSTATE INSURANCE COMPANY, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

BRIEF OF STATE FARM FIRE AND CASUALTY COMPANY, ET AL., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Petition for Writ of Certiorari should be granted even though the District Court correctly applied this Court's precedents in dismissing plaintiffs' industry-wide action against 23 insurance companies under the Fair Housing Act for lack of standing at the class certification phase after extensive discovery revealed that the plaintiffs had no evidence to support their allegations of indirect injury.

2. Whether the Petition for Writ of Certiorari should be granted even though the plaintiffs' Fair Housing Act claims were dismissed by the District Court without prejudice to each plaintiff's right to refile claims against those defendants that allegedly caused injury to the plaintiff, and plaintiffs in fact have refiled separate actions against most of the defendants reasserting Fair Housing Act claims.

PARTIES TO THE PROCEEDINGS BELOW AND RULE 29.6 STATEMENT

Petitioners:

Cynthia E. Canady; Marva Jean Saunders; Mischelle A. Greer; Jimmy D. Hunt; Tamara A. Hunt; Kim Y. Nickerson; Esther E. Moten; Kerry L. Butler; Nadine Farris; Charles Lockridge; Coleman McClain; Evalin McClain; Alma Hammonds; John Hammonds; Sara Kenner; and Clarence Kenner.

Respondents:

Allstate Insurance Company; American Family Mutual Insurance Company; American Economy Insurance Company; American States Insurance Company; American States Preferred Insurance Company; Federal Insurance Company; Pacific Indemnity Insurance Company; Vigilant Insurance Company; Sun Insurance Office of America, Inc.; Sea Insurance Company of America; Liberty Mutual Insurance Company; Farm Bureau Town & Country Insurance Company; Farmers Insurance Exchange; Fire Insurance Exchange; Mid-Century Insurance Company; Farmers & Merchants Insurance Company; Prudential Property and Casualty Insurance Company; Safeco Insurance Company of America; Shelter Mutual Insurance Company; Shelter General Insurance Company; State Farm Fire and Casualty Company; State Farm General Insurance Company; and Old Reliable Casualty Company.

This Opposition is being filed on behalf of the following respondents: State Farm Fire and Casualty Company, State Farm General Insurance Company, Allstate Insurance Company, Safeco Insurance Company of America, American States Insurance Company, American Economy Insurance Company, American States Preferred Insurance Company, and Prudential Property and Casualty Insurance Company.

State Farm Mutual Automobile Insurance Company is the parent company to both State Farm Fire and Casualty Company and State Farm General Insurance Company. Neither State Farm Fire and Casualty Company nor State Farm General Insurance Company have any nonwholly owned subsidiaries.

Allstate Insurance Company is a wholly owned subsidiary of the Allstate Corporation. Allstate Insurance Company does not have any nonwholly owned subsidiaries.

Safeco Corporation is the parent company to Safeco Insurance Company of America and American States Financial Corporation. American States Financial Corporation is the parent company of American States Insurance Company, which is the parent company of American Economy Insurance Company and American States Preferred Insurance Company. Safeco Insurance Company of America, American States Insurance Company, American Economy Insurance Company and American States Preferred Insurance Company do not have any nonwholly owned subsidiaries.

The Prudential Insurance Company of America is the parent company of Pruco, Inc. Pruco, Inc. is the parent company to Prudential Property and Casualty Insurance Company. Prudential Property and Casualty Insurance Company is the parent company to Prudential General Insurance Company, Prudential Commercial Insurance Company, Prudential Insurance Brokerage Inc., and Merastar Insurance Company. There are no nonwholly owned subsidiaries of Prudential Property and Casualty Insurance Company.

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The petition for a writ of certiorari should be denied. It seeks review of a unanimous, unpublished per curiam decision of the Eighth Circuit, which disposed of petitioners' appeal from a District Court decision under Circuit Rule 47B, reserved for instances in which "an opinion would have no precedential value." 8th Cir. R. 47B. *See* Pet. App. at 3a-4a. Contrary to petitioners' contention, neither the Court of Appeals nor the District Court ruled that a claim of indirect injury was insufficient to support standing under the Fair Housing Act and nothing in their rulings conflicted with this Court's precedents in any manner. Instead, the District Court—after recognizing that such allegations *could* support standing—found that in this particular case petitioners had failed to come forward

with any record evidence substantiating their broad allegations. The question presented is thus the intensely fact-specific one of whether the District Court—upheld by the Court of Appeals, with no recorded dissent on petition for rehearing en banc—erred in determining that petitioners had failed to come forward with facts supporting their standing allegations. Such a fact-based question does not satisfy this Court's criteria for granting certiorari, *see* S. Ct. Rule 10 ("A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings"), and the petition accordingly should be denied.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the statutory provisions reproduced in the petition, Pet. at 1-2, this case also implicates Article III, Section 2 of the United States Constitution, which extends "[t]he judicial Power . . . to all Cases [and] . . . Controversies . . ."

STATEMENT OF THE CASE

This case involves the plaintiffs' attempt to prosecute an industry-wide class action lawsuit under the Fair Housing Act,[1] 42 U.S.C. § 3601 *et seq.*, on behalf of all the homeowners residing in 25 different "predominantly minority" zip codes in St. Louis and Kansas City, Missouri. Plaintiffs filed their suit against 23 insurance companies—which comprise most of the homeowners insurance market

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[1] Plaintiffs' initial Complaint asserted claims against the defendants under the Fair Housing Act, 42 U.S.C. § 3604(a) and (b), the federal Civil Rights Acts, 42 U.S.C. §§ 1981, 1982, and 1985(3), and under Missouri common law prohibiting civil conspiracy. Plaintiffs' Section 3604(a) and federal and common law conspiracy claims were dismissed early in the case, and plaintiffs do not challenge that decision here. Plaintiffs likewise do not challenge the District Court's dismissal of their claims under Sections 1981 and 1982 for lack of standing.

in Missouri alleging that each of the defendants had engaged in discriminatory sales, pricing, and underwriting practices in the sale of their homeowners insurance products. Plaintiffs claimed that the asserted class and each of them had been injured by the acts of every defendant because every defendant's conduct allegedly contributed to and caused indirect injury to each plaintiff in the form of diminished property values.

Initially, several defendants moved to dismiss plaintiffs' Fair Housing Act and other civil rights claims for lack of standing. Those insurers argued that plaintiffs who had no contact with them could not adequately allege that the insurer had caused them any harm. The District Court denied those initial motions. Relying directly on this Court's decision in *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91 (1979), the District Court held that at the pleading stage, a plaintiff's allegations of indirect injury fairly traceable to a defendant's actions must be taken as true and can support a claim under the Fair Housing Act.

The District Court then directed the parties to prepare the case for determination of the class certification issue. The District Court ordered the parties to engage in phased discovery, with the first phase devoted to the question of whether plaintiffs' proposed class could be certified. While plaintiffs describe this discovery as "limited" (*see* Pet. at 4), it actually was very extensive and intensive.[2] Among the primary contentions plaintiffs sought to establish during class certification discovery were (i) that each named plaintiff had suffered indirect injury, as alleged, and (ii) that the existence of indirect injury in the form of diminished property values would be a common issue of fact upon which certification of a class could be based.

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[2] Over the course of three months, more than fifty witnesses were deposed, and defendants produced tens of thousands of documents. Expert discovery was also conducted, involving the production of hundreds of pages of expert reports and the depositions of plaintiffs' four experts and eight defense experts.

The parties developed an extensive record for the District Court's consideration in connection with plaintiffs' motion for class certification. That evidence demonstrated that the defendants did not have common underwriting, rating, or sales practices.[3] The evidence also demonstrated that *none* of the named plaintiffs had dealt directly with every one of the defendants, and that several of the defendants had never been the subject of any contact or attempted contact at all with any of the named plaintiffs. Most significantly, plaintiffs failed to develop or submit any competent evidence that the named plaintiffs and the proposed class suffered indirect injury in the form of diminished property values as a result of any of the defendants' alleged conduct, and indeed, the evidence was to the contrary. For example, several of the individual plaintiffs and a local realtor, who was plaintiffs' witness, testified to increases in the value of homes in the minority neighborhoods plaintiffs sought to represent, underscoring the absence of any common, indirect injury of diminution in property values.[4] In addition, several of the named plaintiffs admitted that they were able to purchase the type of coverage they desired, undercutting plaintiffs' allegation that diminished property values resulted from the defendants' alleged refusal to sell homeowners insurance in the zip code "neighborhoods."

The only evidence plaintiffs submitted to the District Court to support the existence of a supposed widespread common injury of diminished property values in minority neighborhoods was a statement by one of their experts, a sociologist. The sociologist stated in his expert report that "property owners within minority neighborhoods in Kansas City and St. Louis have suffered damage as a result of the alleged conduct of the defendants, whether they have ever personally dealt with the defendants or

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[3] Def. Jt. App. at Vol. XIII, 2530-32, 2442-43, 2554-78.

[4] Def. Jt. App. at Vol. V, 1039-40, 1165-66, 1175-76; Vol. VI, 1243, 1246-47, 1284; Vol. VIII, 1781-82.

not, and regardless of their own personal experiences with homeowners insurance." Pl. App. at 390-91. The sociologist, however, admitted during discovery that his opinion regarding the existence of a diminution in property values was based on assumption only, and conceded that he had not performed an analysis of housing values in Kansas City or St. Louis.[5]

At the close of class certification discovery, the District Court took plaintiffs' motion for class certification and the parties' evidentiary submissions and briefs under consideration. At the same time, one of the defendants (Old Reliable Casualty Company) submitted summary judgment papers renewing its challenge to plaintiffs' claims for lack of standing. After reviewing the parties' extensive submissions, the District Court entered an order denying plaintiffs' request for class certification and dismissing plaintiffs' claims without prejudice. First, the District Court correctly rejected plaintiffs' proposed class definition of homeowners from 35 different zip codes spanning two different cities as overbroad. The District Court stated that:

> By plaintiffs' calculus, a neighborhood is defined by zip code boundaries. However, especially in urban areas, several distinct neighborhoods are often lumped together in one zip code. Historic homes and expensive neighborhoods are sometimes included [in] the same minority zip codes as contain less economically desirable neighborhoods. For this and other reasons,

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[5] Def. Jt. App. at Vol. VIII, 1888, 1894. Plaintiffs also improperly attempted to bolster their claims and bid for class certification (and their Petition before this Court) by claiming that an internal document purportedly written by an employee of the Missouri Department of Insurance constituted a conclusion *by* the Department that the defendants were engaged in redlining. However, an official representative from the Department specifically repudiated plaintiffs' characterization that the document constituted a pronouncement by the Department, and further denied that the Department had made any finding that the Defendants had engaged in redlining. Dep. of Stephen Stark at 370-76.

> some of the distinct neighborhoods within particular minority zip codes are not comprised primarily of minority-owned homes.

Pet. App. at 9a.

The District Court also rejected plaintiffs' assertion that they had presented evidence proving that everyone residing within one of the 25 predominantly minority zip code "neighborhoods" had suffered a diminution in property values.

> [P]laintiffs have actually not so proven. A class comprised of every predominantly minority zip code in Kansas City and St. Louis, Missouri, numbering at least 93,000 persons is not the "relatively compact neighborhood" envisioned by *Gladstone Realtors v. Bellwood*, 441 U.S. 91, 114 (1979), and plaintiffs have not borne their burden of proving that every person living within a predominantly minority zip code has suffered injury in fact. *See South Suburban Housing Center v. Sauterfort Real Estate, Inc.*, 658 F. Supp. 1430, 1438-37 (N.D. Ill. 1987).

Pet. App. at 9a.

The District Court next examined whether plaintiffs could continue to pursue their action based on allegations of *direct* injury attributable to all 23 defendants. The District Court found insufficient support for standing under that theory as well. As the District Court correctly recognized, each of the named plaintiffs had affirmatively testified that they could only recall contacting at *most* a handful of the defendants, many had successfully obtained precisely the type of homeowners coverage they desired from one or the other of the defendants, and many further admitted that they had no complaints about their coverage. Thus, the District Court properly ruled that "where different members of the proposed plaintiff class have allegedly suffered due to the illegality of one or more—but less than all—of the defendants, certification is not proper against such a class of unrelated defendants. . . ." Pet. App. at 15a.

The District Court held that plaintiffs could not maintain their case in the form they had chosen—an industry-wide action against numerous, unrelated insurers who had engaged in different practices and had different dealings, if any, with different plaintiffs. However, the District Court dismissed plaintiffs' claims *without prejudice*, leaving "each plaintiff who chooses to do so" free to "refile against the defendant or defendants with whom each plaintiff has alleged grievances." Pet. App. at 20a. Plaintiffs have taken full advantage of this opportunity—they have filed separate proposed class actions asserting Fair Housing Act claims against most of the defendants in this case, and those new suits remain pending before Judge Gaitan in the United States District Court for the Western District of Missouri.

REASONS FOR DENYING THE WRIT

This is not a case calling for an exercise of this Court's supervisory power. Plaintiffs have asked this Court to grant their petition for a writ of certiorari because the decisions of the courts below supposedly "conflict[] directly with three prior opinions of this Court" and allow standing under the Fair Housing Act only upon a showing of direct injury. Pet. at 4, 5. Plaintiffs' contentions, however, flatly misrepresent the decisions they challenge. What the District Court and the Eighth Circuit actually held was that while allegations of indirect injury may be sufficient to support a Fair Housing Act complaint at the *pleading* stage, once it became clear that plaintiffs could not demonstrate that they actually suffered an alleged indirect injury fairly traceable to defendants' conduct, dismissal of their claims for lack of standing was required. The lower courts' decisions are entirely consistent with this Court's jurisprudence on the issue of standing under the Fair Housing Act, and the decisions in no way threaten either this Court's authority or the continued vitality of the Fair Housing Act. Indeed, far from being denied an opportunity to prosecute Fair Housing Act

claims for injuries other than the diminution in property values they could not prove, plaintiffs were permitted to "refile against the defendant or defendants with whom each plaintiff has alleged grievances." Pet. App. at 20a. They have in fact refiled separate actions against most of the insurer defendants. There is no basis for this Court's involvement in this matter.

I. THE DECISIONS PLAINTIFFS CHALLENGE ARE ENTIRELY CONSISTENT WITH SUPREME COURT PRECEDENT.

A. Established Standing Jurisprudence Requires That An Action Be Dismissed If A Plaintiff Clearly Cannot Prove Actual Injury Fairly Traceable To The Conduct Of Defendants.

Throughout their Petition, plaintiffs invoke their allegations of indirect injury as if those mere allegations guaranteed them the right to proceed all the way to trial of their Fair Housing Act claims, regardless of the development of evidence during the pretrial phase of the case. That is simply incorrect, and none of this Court's prior decisions so hold.

Regardless of the nature of the claim a plaintiff seeks to pursue, under the irreducible, minimum Article III requirements for standing,[6] a plaintiff whose standing is

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[6] This Court has previously articulated the fundamental elements of Article III standing:

> Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the

based on an alleged indirect injury must, as the case progresses, *demonstrate* that he or she *actually suffered* that indirect injury. As this Court explained long ago, the fact that the federal courts are courts of limited jurisdiction:

> precludes the idea that jurisdiction may be maintained by mere averment or that the party asserting jurisdiction may be relieved of his burden by any formal procedure. If his allegations of jurisdictional facts are challenged by his adversary in any appropriate manner, he must support them by competent proof.

McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 189 (1936). At the pleading stage, the standing allegations must be accepted as true, but as the case proceeds, "the allegations must be true and capable of proof at trial." *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 689 (1973). Allegations suffice at the outset, but at later stages of the case, the facts supporting standing "must affirmatively appear in the record." *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 546 (1986).

This Court has held that allegations of indirect injury in a Fair Housing case are sufficient to establish standing *at the pleading stage*, and nothing in the District Court or Court of Appeals opinions is to the contrary. But this Court's cases establish two other principles that petitioners ignore. The first is that as a case proceeds, a plaintiff has an ongoing obligation to demonstrate that he or she continues to have standing to proceed with his or her claims. *See Lujan*, 504 U.S. at 560-61. The second is that whether a plaintiff's standing is based on allegations of indirect or direct injury, the plaintiff's claims cannot

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court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992).

proceed in the face of evidence he or she did not actually suffer "injury in fact." *Id.*, at 561. Thus, it is plaintiffs' contention that their claims should have been permitted to proceed despite their inability to demonstrate actual indirect injury that flies in the face of long-established standing jurisprudence.

B. The Courts Below Did Not Reject This Court's Recognition In *Havens*, *Gladstone*, and *Trafficante* That An Actual Indirect Injury May Satisfy The Standing Requirements For A Fair Housing Act Claim.

At the pleading stage of this case, the District Court accepted as true plaintiffs' allegations that the defendants' actions had caused a diminution in the value of their own homes and those of all homeowners within the "minority neighborhoods," whom plaintiffs sought to represent. Accordingly, the District Court initially denied various defendants' motions to dismiss plaintiffs' Fair Housing Act claims based on lack of standing. The District Court, citing to this Court's decisions in *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), and to *Gladstone, Realtors v. Bellwood*, 441 U.S. 91 (1979), specifically stated that Fair Housing Act claims need meet only the constitutional minimum of Article III standing, and that *allegations* of indirect injury are sufficient to support a plaintiff's standing under the Act *at the pleading stage* of litigation. *See* Pet. App. at 28a-29a.[7]

Although the plaintiffs acknowledge the District Court's initial ruling on the issue of standing, they complain that the District Court (with the blessing of the Eighth Circuit) inexplicably "seized" the opportunity at the close of class certification discovery to "reverse[] its earlier

[7] The decision set forth at Appendix D to plaintiffs' Petition is incorrectly captioned as an "Order of the United States Court of Appeals for the Western District of Missouri, Western Division," but in fact was a decision by the District Court.

decision regarding claims of indirect injury" and to dismiss plaintiffs' claims. Pet. at 4. According to plaintiffs, the District Court in its subsequent decision rejected the very concept of indirect injury claims under the Fair Housing Act. *Id.* Neither the District Court nor the Eighth Circuit, however, embarked upon any such departure from Supreme Court precedent.

Plaintiffs contend that the District Court defied this Court's decisions in *Havens, Gladstone,* and *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972), when dismissing their case. Plaintiffs' contention is meritless. Each of the decisions they cite evaluated whether Fair Housing Act claims of plaintiffs alleging indirect injury as a result of discriminatory practices could survive motions to dismiss. None of these cases stands for the proposition that a plaintiff who has suffered no *actual* injury (whether direct or indirect) may continue to pursue an industry-wide Fair Housing Act claim.

In *Trafficante,* 409 U.S. at 205, this Court held that minority and non-minority tenants of a single apartment complex had standing to sue their landlord under the Fair Housing Act for the landlord's alleged refusal to rent to minorities. The plaintiffs there alleged that they had suffered humiliation and embarrassment, and had lost the benefits of living in an integrated community, as a result of the landlord's alleged conduct. *Id.* at 208. Considering the case only on the pleadings and not in the context of a class certification motion, the District Court dismissed the plaintiffs' complaint for lack of standing, the Ninth Circuit affirmed, and this Court then reversed the order of dismissal. *Id.* Noting that "[w]hat the *proof* may be is one thing," this Court held that "insofar as tenants of the same housing unit that is charged with discrimination" were concerned, the plaintiffs had adequately *alleged* individual injury or injury in fact. *Id.* at 209-10 (emphasis added).

In *Gladstone*, 441 U.S. 91, this Court again held that at the pleading stage, allegations of indirect injury are sufficient to supply the Article III standing required to state a viable claim for relief under the Fair Housing Act. The plaintiffs in *Gladstone* were the Village of Bellwood and six individuals who claimed that they had been injured by the realtors' racial steering within a 12- by 13-block area of Bellwood because they had been " 'denied their right to select housing without regard to race and have been deprived of the social and professional benefits of living in an integrated society.' " *Id.* at 95. This Court held that the plaintiffs living within the identified area had adequately alleged an injury that might be fairly traceable to the alleged discriminatory conduct of the defendants, but further held that plaintiffs living outside the "target neighborhood" lacked standing to assert claims for injunctive relief. *Id.* at 112-14; *see also Urban Contractors Alliance v. Bi-State Development Agency*, 531 F.2d 877, 880 (8th Cir. 1976) (plaintiffs lacked standing where they did not live in an allegedly affected community or belong to any other affected group).[8] Then, this Court specifically noted that the question before it was whether plaintiffs' allegations were sufficient "at the pleading stage," and also noted that at later stages of the case, plaintiffs' allegations would be subject to proof before the District Court, such as "convincing evidence that the economic value of [a plaintiff's] own home has declined." *Gladstone*, 441 U.S. at 112-13, 115.

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[8] Plaintiffs grossly overstate this Court's decision in *Gladstone* when they claim that this Court in that case "allowed standing to every homeowner in the Village of Bellwood." Pet. at 9. This Court did no such thing. This Court merely addressed whether the plaintiff Village and the six individual plaintiffs had standing to sue, at the pleading stage, based on alleged indirect injury, and further emphasized that a critical element of standing for *any* Fair Housing Act plaintiff still requires ultimate proof of an actual, genuine injury in one form or another. *Gladstone*, 441 U.S. at 114.

Finally, this Court's decision in *Havens*, 455 U.S. 363, again reaffirmed what is not put at issue by the Petition—that at the pleading stage, allegations of indirect injury can be sufficient to support a plaintiff's standing to sue under the Fair Housing Act. *Havens*, like *Gladstone*, involved claims of racial steering by the owner of two apartment complexes. The plaintiffs alleged that they and the residents of an entire county of over 170,000 people all had suffered indirect injury as a result of the defendants' alleged intentional discrimination. *Id.* at 377 & n.18. This Court ruled that plaintiffs had not adequately defined a neighborhood which could plausibly have experienced the injury alleged: "It is indeed implausible to argue that petitioners' alleged acts of discrimination could have palpable effects throughout the entire Richmond metropolitan area." *Id.* at 377. This Court nevertheless declined to dismiss the plaintiffs' complaint *at the pleading stage*, and instead permitted the case to proceed for "further factual development" that would allow the plaintiffs to refine the allegations of their complaint. *Id.*

Neither *Havens*, *Trafficante*, nor *Gladstone* stands for the proposition that a federal district court must continue to entertain Fair Housing Act claims *even after* discovery reveals that there is no evidence to support the existence of a plaintiff's alleged indirect injury. The District Court in this case, consistent with the three decisions of this Court that plaintiffs have invoked, accepted plaintiffs' allegations of indirect injury as true during the pleading stage of the case. The District Court here, consistent with well-established standing jurisprudence, gave plaintiffs the opportunity to conduct discovery during the class certification phase to demonstrate that the existence of their alleged indirect injury would be a common issue in the action. When plaintiffs could not meet even *that* minimal evidentiary threshold, it was not only appropriate for the District Court to reject plaintiffs' alleged indirect injury as

a basis for their standing, it was incumbent upon the District Court to do so.

C. It Was Entirely Appropriate For The District Court To Dismiss Plaintiffs' Industry-Wide Challenge After Determining That Their Claim Of Indirect Injury Was Insupportable.

Plaintiffs suggest that the District Court erred in reexamining their standing after the close of class certification discovery. Pet. at 11. That misstates the law. Standing "is perhaps the most important of [the jurisdictional] doctrines," and federal courts are under a continuing obligation independently to reexamine whether standing exists as a case proceeds. *Allen v. Wright,* 468 U.S. 737, 750 (1984); *see also State of Missouri ex rel. Missouri Highway & Transp. Comm'n v. Cuffley,* 112 F.3d 1332, 1334 (8th Cir. 1997). Because the elements of standing "are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each [standing] element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., *with the manner and degree of evidence required at the successive stages of the litigation.*" *Lujan,* 504 U.S. at 561 (emphasis added).

The District Court clearly understood its ongoing obligation to reexamine the plaintiffs' standing at each successive stage of the case. Indeed, the District Court expressly acknowledged that although plaintiffs' allegations had been sufficient to survive a motion to dismiss at the initial stage of the case, the absence of standing was clearly evident after class certification discovery had been conducted:

> In the early stage of this litigation, the court denied defendants' motion to dismiss on standing grounds, recognizing that an indirect injury is often sufficient to establish standing to sue if the injury is fairly traceable to the conduct of the defendants.

> Order dated October 10, 1996, p. 4. When ruling a motion to dismiss, the court must grant every reasonable inference to the plaintiffs. *Morton v. Becker*, 793 F.2d 185, 187 (8th Cir. 1986). Dismissal of plaintiffs' case on standing grounds would have been premature at that stage because the class was not well-defined and class discovery had not yet taken place.
>
> As litigation progresses, however, and the facts and basis of the litigation become apparent, reasonable inferences are no longer afforded and plaintiffs allegations must clearly indicate that standing is proper. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Although standing and class certification are separate and distinct issues, an unfavorable analysis by the court of the class certification issue, especially with regard to the typicality requirement of Rule 23(a)(3), often makes evident that standing is also lacking.

Pet. App. at 18a-19a.

Class certification discovery in this case revealed that plaintiffs' standing allegations were based on wholly unsupported contentions of indirect injury spanning multiple areas in two different cities. Plaintiffs failed to identify any evidence demonstrating that any particular neighborhood or group of individuals in fact suffered a diminution in the value of their homes. Moreover, instead of identifying the type of "relatively compact" neighborhood from which a court could ever find effects fairly traceable to a defendant's conduct, the "neighborhood" plaintiffs identified encompassed 25 zip codes in Kansas City and St. Louis, and assertedly includes more than 93,000 people. *See* Pl. App. 106, 113. The vast area encompassed by plaintiffs' proposed class definition is precisely the type of area that this Court has cautioned against as "so extensive in area, so heavily or even so sparsely populated, or so lacking in shared social and commercial intercourse that there would be no actual injury to a particular resident."

Gladstone, 441 U.S. at 114. Plaintiffs likewise failed to show that any alleged "diminution" in property values could ever be fairly traceable to any of the defendants.[9] Based on this record, it was entirely appropriate for the District Court to reject plaintiffs' unsupported allegations of diminished property values as a basis for the continued prosecution of their industry-wide challenge against multiple, unrelated defendants.

As the court in *Washington v. Vogel,* 156 F.R.D. 676 (M.D. Fla. 1994), succinctly stated when dismissing an organization's civil rights claims for lack of standing at the class certification stage of the proceeding:

> Were this case at the motion to dismiss stage, the Court would be required to accept as true the plaintiffs' allegations concerning standing. . . . However, this . . . action has been pending for nearly a year. The parties have engaged in extensive discovery. . . . Under these circumstances, the plaintiffs cannot rest on mere allegations in the pleadings . . . .

Id. at 682 (citations omitted). Indeed, it was inherent in the District Court's consideration of plaintiffs' motion for class certification for the District Court also to examine the issue of standing because Rule 23(a), Fed. R. Civ. P. 23(a), implicitly requires plaintiffs to show they are part of the proposed class and that they "possess the same interest and suffered the same injury as the class mem-

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[9] To demonstrate such a causal link, plaintiffs first would need to separate the impact of any conduct by each defendant from all the other factors which affect property value, then demonstrate that the injury could be attributed to each defendant individually, and finally show that any individual homeowner was injured in the manner alleged. *Jorman v. Veterans Admin.*, 830 F.2d 1420, 1425-27 (7th Cir. 1987) (plaintiffs lacked standing where they were unable to show that racial segregation in the Marquette Park neighborhood of Chicago was fairly traceable to the VA's mortgage lending activities); *see also Vann v. Housing Authority of Kansas City, Mo.*, 87 F.R.D. 642, 651 (W.D. Mo. 1980).

bers."[10] At later stages of a case, "'[n]o presumptive truthfulness attaches to the plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims. Moreover, the plaintiff will have the burden of proof that jurisdiction does in fact exist.'" *Osborn v. United States,* 918 F.2d 724, 730 (8th Cir. 1990) (quoting *Mortensen v. First Federal Sav. & Loan Ass'n.,* 549 F.2d 884, 891 (3d Cir. 1977)).

Plaintiffs had ample opportunity during the class certification phase of the case to develop and submit evidence of a common, indirect injury of diminished property values to support their request for class certification. Significantly, plaintiffs have offered no argument or any direct challenge at all to the District Court's factual determination that their evidence on that point was insufficient.[11] That plaintiffs simply failed to meet their burden

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[10] *Bishop v. Committee on Professional Ethics,* 686 F.2d 1278, 1287-89 (8th Cir. 1982) (citing *East Texas Motor Freight System, Inc. v. Rodriguez,* 431 U.S. 395, 403 (1977)); *see also Central Wesleyan College v. W.R. Grace & Co.,* 6 F.3d 177, 188 (4th Cir. 1993) (quoting *Sosna v. Iowa,* 419 U.S. 393, 402 (1975)) ("In the class action context, the . . . Article III requirement must be met 'at the time the complaint is filed, and at the time the class action is certified by the District Court pursuant to Rule 23.'"); *Griffin v. Dugger,* 823 F.2d 1476, 1482 (11th Cir. 1987), *cert. denied,* 486 U.S. 1005 (1988).

[11] The District Court's factual determination that plaintiffs lacked standing to sue based on their alleged indirect injury is entitled to deference, and may only be overturned if clearly erroneous. *Osborn,* 918 F.2d at 729-30. A district court has "'broader power to decide its own right to hear [a] case than it has when the merits of the case are reached.'" *Id.* (quoting *Williamson v. Tucker,* 645 F.2d 404, 413 (5th Cir.), *cert. denied,* 454 U.S. 897 (1981)).

to establish standing certainly does not create an issue worthy of an exercise of this Court's supervisory powers.

II. THE DISTRICT COURT'S DISMISSAL OF PLAINTIFFS' ASSERTED INDUSTRY-WIDE CLASS ACTION WITHOUT PREJUDICE, WHICH ALLOWED PLAINTIFFS TO REFILE ACTIONS AGAINST INDIVIDUAL DEFENDANT COMPANIES, POSES NO THREAT TO THE CONTINUED VITALITY OF THE FAIR HOUSING ACT.

Plaintiffs make the baseless assertion that the District Court's dismissal of their improperly-framed, industry-wide challenge will eviscerate the Fair Housing Act. As set forth above, the District Court's ruling is entirely consistent with Fair Housing Act jurisprudence. Moreover, plaintiffs failed to inform this Court that the District Court's dismissal order was without prejudice, that plaintiffs were expressly granted leave to refile their Fair Housing Act challenges as separate suits against the individual defendant companies with whom they had direct contact, and that plaintiffs have in fact refiled separate Fair Housing Act lawsuits as asserted class actions against most of the 23 defendants in *Canady*. There is no reason for this Court to become involved now in *Canady* or its progeny.

Once it was clear that plaintiffs could not establish standing to sue all the defendants in a single action based on their alleged *indirect* injury, the District Court considered whether plaintiffs' allegations of *direct* injury were sufficient to support the continued pendency of their industry-wide action. Class certification discovery, however, had revealed that none of the individual plaintiffs had or could allege that he or she suffered injury as a result of direct contact with every one of the defendants. Some of the defendants were not contacted by any plaintiffs, and no single plaintiff contacted even a majority of the defendants. Several plaintiffs admitted that they were not dissatisfied with the products, prices, or services they received from certain of the defendants they had con-

tacted. *See* Jt. App. Vol. V, 1000-12. In short, there was no basis for an industry-wide challenge.

It is a basic tenet of jurisdictional law that in a multiple-defendant action, *each* plaintiff must establish standing to sue *each* party named as a defendant. *Warth v. Seldin*, 422 U.S. 490, 502 (1975); *La Mar v. H&B Novelty & Loan Co.*, 489 F.2d 461, 469-70 (9th Cir. 1973). Numerous courts have rejected a plaintiff's standing to sue multiple defendants where the plaintiff could not establish injury attributable to the conduct of each defendant.[12] The District Court here followed the Ninth Circuit's decision in *La Mar*, once it had determined that plaintiffs could not support their indirect injury claims, and correctly concluded that plaintiffs could not proceed against those defendants with whom they had not even attempted any contact or dealing:

> While a plaintiff would have standing to represent a class of similarly situated persons who had allegedly suffered injury by the same defendant, that plaintiff

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[12] *See La Mar*, 489 F.2d at 469-70; *Angel Music, Inc. v. ABC Sports, Inc.*, 112 F.R.D. 70, 75-76 (S.D.N.Y. 1986) (copyright owner lacked standing to assert class action against members of the television industry with whom it had not dealt); *accord, Thompson v. Board of Educ.*, 709 F.2d 1200, 1204-05 (6th Cir. 1983) (teachers lacked standing to assert class action against school districts for which they had not worked); *Pope v. City of Clearwater*, 138 F.R.D. 141, 145 (M.D. Fla. 1991) (applicant for utility service lacked standing to assert class action against municipalities to which it had not applied); *Akerman v. Oryx Communications, Inc.*, 609 F. Supp. 363, 377 (S.D.N.Y. 1984) (investors lacked standing to assert class action against underwriters from whom they had not purchased), *aff'd*, 810 F.2d 336 (2d Cir. 1987); *Vulcan Soc'y of Westchester County, Inc. v. Fire Dep't of City of White Plains*, 82 F.R.D. 379, 398-99 (S.D.N.Y. 1979) (firefighters lacked standing to assert class action against municipalities for which they did not work); *Chevalier v. Baird Sav. Ass'n*, 66 F.R.D. 105, 109 (E.D. Pa. 1975) (mortgagors lacked standing to assert class action against lenders from whom they did not borrow); *Weiner v. Bank of King of Prussia*, 358 F. Supp. 684, 694 (E.D. Pa. 1973) (borrower lacked standing to assert class action against banks with which he had no credit transactions).

> would not, in the absence of an alleged conspiracy, have standing to represent a class of all persons similarly situated who have allegedly suffered injury at the hands of different defendants even if those defendants are members of the same industry and the legal violation is allegedly widespread.

Pet. App. at 19a.

Plaintiffs here failed to allege a viable claim of conspiracy against the defendants. In view of the absence of such a viable claim, and the lack of any showing of a common, indirect injury to link the defendants together, the District Court's determination that no plaintiff could proceed against defendants against whom they had alleged no direct injury was clearly correct. *Id.* at 20a. The District Court's decision to dismiss the plaintiffs' improperly framed action, while still allowing the individual plaintiffs leave to file new suits against those defendants they claimed had injured them directly, was entirely consistent with the principles of standing, and did not in any way undermine this Court's precedents or the Fair Housing Act itself.[13]

CONCLUSION

The decisions of the District Court and the Eighth Circuit are entirely consistent with the prior decisions of this Court, and they clearly do not "so far depart[] from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power." S. Ct. Rule 10(a), 10(c). For all of the foregoing reasons, the Petition should be denied.

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[13] Although plaintiffs suggest that the District Court's ruling would leave plaintiffs with no ability to sue a defendant who allegedly made "extraordinary efforts to avoid all dealing with homeowners in minority areas," (Pet. at 12) that contention plainly is meritless. A fair reading of the District Court's ruling is that a plaintiff who contacted such a defendant to seek insurance and allegedly suffered discrimination in connection with that contact could pursue a claim against the defendant.

Respectfully submitted,

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